No. 4001

IN THE

United States

Circuit Court of Appeals

For the Ninth Circuit.

WILLIAM J. CAMPBELL and J. W. TOBIN,
Plaintiffs in Error,

vs.

ARCHIE McINTYRE, as Administrator of the Estate of WILLIAM GRANT, Deceased,
Defendant in Error.

Upon Writ of Error to the District Court for Alaska, Division Number Four.

BRIEF FOR DEFENDANT IN ERROR.

MORTON E. STEVENS,
Fairbanks, Alaska,
Attorney for Defendant in Error.

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Brief for Defendant in Error.

STATEMENT OF THE CASE BY DEFENDANT IN ERROR.

Numerous statements contained in the brief of plaintiffs in error, as to the facts of this case, not being justified by the evidence, and, particularly not by a preponderance of evidence, and, therefore, are contrary to the necessary findings of the jury, must be controverted by Defendant in Error. We, therefore, submit our statement of the case based upon the record herein.

This is an action brought by defendant in error, against plaintiffs in error, in ejectment, commonly known as an action to try title to mining property.

The complaint alleges the ownership and right of possession of placer claim known as Hill Bench Claim, containing twenty acres, adjoining and being east of the Horseshoe Placer claim, on the right limit of Moose Creek, Kantishna Precinct, Alaska. Plaintiff further alleges the ownership and right of possession to a quartz location known as Hill Side Lode Claim, located partly upon and running through said Hill Bench Placer Claim, as therein described. Said complaint alleges the wrongful possession of defendants.

The answer, after a denial of all material matters contained in the complaint, alleges title and possession in defendants of a quartz claim, known as Silver King Lode Mining Claim, based upon defendant's alleged location thereof, June 6, 1921 (which is prior to plaintiff's location of Hill Side Lode Claim). It is conceded that the two lode claims described in the pleadings cover the same discovery, vein or lode. The only substantial difference in the boundaries being that plaintiff's lode claim is 25 feet on either side of the center of the vein, in width, while defendant's claim is described as 300 feet on either side of the center of said vein.

William Grant, plaintiff below, 62 years of age, had been a miner for over 40 years. (Tr., pp. 51, 54.) On September 10, 1919, he entered upon the placer ground in controversy and in front of and near his present cabin he dug two or three holes and panned three pans of the contents thereof and found gold in all of them; one pan disclosed colors and the contents of the other two pans described

gold as "fairly good," "fairly coarse," and "fairly rough." At that time plaintiff knew that men had been placer mining on Moose Creek and on Friday Creek near by for many years. (Tr., pp. 55–60.) This prospector took these facts into consideration, including the character of the ground, its formation, the location with reference to other placer claims and the amount of gold found in said pans; stated that such a discovery would justify an ordinary prudent man expending further labor or money in developing the property for placer mining purposes. (Tr., p. 62.)

April 19, 1920, plaintiff below went back upon this ground, in company with John Hamilton and another. Hamilton owned the adjoining claim known as the Horseshoe Claim. They went to one of Hamilton's corner stakes, whereupon plaintiff below, after obtaining permission from Hamilton, adopted this stake as the initial stake of Mr. Grant. (Tr., pp. 64, 65.)

This stake extended about four feet above the ground and was four or five inches in diameter, squared on four sides. (Tr., p. 63.) Grant thereupon wrote upon the side of said stake towards his proposed placer claim, his name, William Grant; "April 19, 1920, I claim 1320 feet up Moose Creek to post No. 2 and 660 feet up hill." He wrote "Hill Side Bench Claim and corner No. 1." He wrote "initial stake of Hill Side Bench mining claim." (Tr., pp. 64–66.)

Mr. Grant then went up Moose Creek where Hamilton found another corner of his Horseshoe Claim

and thereupon adopted Hamilton's corner stake as Grant's corner stake No. 2. This stake was between three and four feet above the ground and over three inches in diameter, squared on four sides. (Tr., pp. 67, 68.) Grant wrote upon the uphill side of this stake, "stake No. 2, claiming 1320 feet down Moose Creek, 660 feet uphill, for placer mining purposes." Also "April 19, 1920." Plaintiff wrote upon said stake the name of the claim and his own name. On this stake No. 2 he marked two arrows, one pointing down Moose Creek and the other arrow pointing uphill. (Tr., pp. 68, 69.)

The next day, April 20, 1920, Grant established his corner post No. 4, the location thereof high up the hill from his initial post, and difficult to reach. This post No. 4 was over three feet above the ground and about six inches in diameter, squared on four sides. Upon this stake the locator wrote "Hill Side Bench Claim," date of location and his name, also wrote No. 4. This was on the lower or downhill side of the post. (Tr., pp. 70, 71.) Upon this post the locator marked the same with two arrows, one pointing down to the initial stake and the other pointing upstream towards post No. 3. (Tr., p. 72.) Mr. Grant then crawled alongside of the hill to a point where he established his post No. 3, where he tied the same to a bush. This post was over three feet above the ground and was three or four inches in diameter, squared, upon which the locator wrote "April 20, 1920, Northeast corner post Hill Side Bench Placer Mining Claim." He num-

bered the same as No. 3 and signed as William Grant locator. (Tr., pp. 73, 74.)

At this post, No. 3, the locator could see post No. 4 and post No. 2. (Tr., p. 73.) Standing at the initial post, No. 1, the other three corner stakes could be seen. Standing at corner post No. 2, the other three posts could be seen. Standing at corner post No. 3, corner posts Nos. 1 and 2 and 4 could be seen. Standing at corner post No. 4 all other corner posts could be seen. This was an open country, having no timber or brush to interfere with the view. (Tr., pp. 81, 82.) The Horseshoe placer claim owned by said Hamilton was a well-known location. (Tr., p. 78.)

July 12, 1920, Wm. Grant filed for record with the recorder of said Kantishna Precinct, Alaska, his location certificate, as set forth in the brief of plaintiffs in error. (Tr., pp. 77, 78.)

After this Hill Bench Placer Claim of plaintiff below was thus located and in the summer of 1920, one J. B. Quigley prospected the hillside upon which plaintiff's placer claim was situate. By sinking a shaft Quigley made a discovery upon a lode, which point of discovery is 170 feet and four inches uphill from and outside of the original boundary lines of said Hill Bench Claim. (Tr., pp. 20, 21.) Grant's placer location, as described on the stakes and certificate called for only 660 feet uphill from his initial post and 1,320 feet up Moose Creek, being twenty acres. The claim, however, as originally stated, was known to be too large.

(Tr., pp. 71, 88–91.) It contained as a matter of fact 23.664 acres. (Tr., p. 26.)

By reason of said discovery Mr. Quigley, August 7, 1920, located a quartz claim known as the Red Top Lode and filed his certificate of location September 15, 1920, with the recorder of said precinct. (Tr., pp. 196, 197.) The boundaries of the Red Top Lode Claim were properly marked upon the ground, claiming 1,500 feet in length and 600 feet in width. (Tr., p. 200.) Quigley started to build, and did build, his residence near Grant's westerly end line and on the line or very close to the line of Quigley's westerly side line of the Red Top. This residence was a little less than 660 feet above Grant's initial post and a little more than 136 feet below and downhill from Grant's northwesterly corner as originally staked (post No. 4). (Plffs. Ex. "A.") Quigley informed Grant that this place of residence was not on Grant's placer claim. (Tr., pp. 88–91.) This statement was accepted to be true and the conduct of these parties disclose the fact that Grant intended to cast off the excess, and that he did thereby cast off a portion of the excess, but that the claim was still too long and upon the basis of a line drawn from the lower end line at a point 660 feet above the initial post to corner No. 3 there still remained in said placer claim 21.65278 acres. (Tr., p. 26.) That after completion of said Quigley residence he built along the sidehill buildings known as the cache, bunk-house and blacksmith-shop. (Plffs. Ex. "A," Map.) (Defts. Ex. "2," Map.) (Tr., pp. 88, 89.)

The boundary lines of Quigley's Red Top Lode Claim, extended far into Grant's placer claim, as originally staked. The lower center end stake being 173 feet below the mouth of Quigley's tunnel, which tunnel entrance is 96 feet and ten inches below the upper side line of the placer claim, as originally staked, but which had been cast off by Grant. In other words, the lower end line of the Red Top Lode Claim, being entirely within the boundaries of the placer claim, and being 600 feet, more or less in length, was located, approximately 269 feet and ten inches below Grant's line, as originally staked. (Tr., pp. 20–22.) This Red Top location which was made without objection upon the part of Grant, and apparently by his consent, takes in the Quigley buildings (with the exception of a portion of the Quigley residence), and includes the mouth of Quigley's tunnel. (Tr., p. 30.) (Plffs. Ex. "A.") This Red Top location cuts out and segregates from the Grant placer location, the balance, and a little more, of the excess in area of the placer claim. It cuts out 3.7 acres. (Tr., pp. 627, 628.) The said lower end line of Quigley's Red Top Claim, by reason of the excess in area of the Bench Placer claim, and acquiescence in such location by Mr. Grant, became the dividing line between the placer claim and said Red Top Claim, and there remained to the placer claim about 20 acres, as originally intended.

There has been no prospecting and no discovery of any quartz or vein between the mouth of the Quigley tunnel and the lower end line of said

Red Top Claim, a distance of 173 feet. (Tr., pp. 92, 199, 202, 203, 221, 222, 444, 445.) No evidence was introduced disclosing or tending to show that any vein or lode was known to exist within the boundaries of Grant's Hill Bench Claim, as modified or changed by the casting off of the excess, by the location of said Red Top Claim. That no lode or vein was known to exist within 173 feet of said Bench Claim. (Tr., pp. 92, 199, 202, 203, 221, 222, 444, 445.)

Plaintiff below, in November, 1920, employed O. M. Grant to prospect and to do assessment work within the boundaries of his said placer location. O. M. Grant, in pursuance of said employment sank nine holes within the boundaries of said placer claim as it then existed. Said nine holes were all below the lower end line of said Red Top Lode Claim. (Plffs. Ex. "A.") (Tr., pp. 84, 85.) O. M. Grant sank the first hole at a point designated by plaintiff below. It was about 25 feet below the center end post of the Red Top Claim and 6 or 7 feet upstream therefrom. (Tr., pp. 215–83.) This hole was sunk by Grant to a depth of 12 feet in November, 1920. (Tr., pp. 217–84–85.) O. M. Grant, June 3, 1921, recognized this same hole and saw at said time defendants below, Campbell & Tobin, working there with a windlass over said hole which is designated on the map as Campbell & Tobin shaft. (Tr., pp. 217, 218.) At said time in June, 1921, the said O. M. Grant observed a fresh hole that looked as if it had been newly dug, located just to the right of the hole designated as the Camp-

bell & Tobin shaft: Which fresh appearing hole the said Grant had not made. (Tr., pp. 217–219.) There was no known lode or vein within the boundaries of Grant's said placer claim as amended by the casting off and location of said Red Top Claim. (Tr., pp. 221, 222–92.)

The defendant in error was absent from his said placer claim from the first of March to the 20th, of June, 1921. (Tr., p. 85.) That at the time plaintiffs in error Campbell and Tobin entered upon Grant's placer claim, which was between the 25th and 30th of May, 1921, Wm. Grant was at Roosevelt, sometimes called the Landing on the Kantishna River, which is about 30 miles from the property in dispute herein. (Tr., p. 97.) He was there engaged in resacking ore for shipment. (Tr., p. 103.) Wm. Grant did not, at any time, give the said Campbell or Tobin permission to enter upon said placer claim for any purpose, and that he did not know of their entering upon the ground until afterwards. (Tr., pp. 97, 98.)

After Wm. Grant had completed resacking ore at Roosevelt, and about June 25, 1921, he went to his placer claim in question and found said Campbell & Tobin working in shaft designated on the map as the Campbell & Tobin Shaft, the same shaft dug 12 feet by said O. M. Grant. (Tr., p. 104.) Said Wm. Grant then posted two trespass notices on the claim, stating that he was the owner of the property and giving the warning that trespassers would be prosecuted. (Tr., pp. 104, 105.) The next morning while on his road back to Roosevelt

with the mail he found that his trespass notices had been torn down. (Tr., pp. 106, 107.) That some time in July Grant returned to the claim, put up a tent on the property, and reposted the trespass notices upon the claim, and while doing so plaintiff in error Campbell threw two rocks at him and the third rock, the size of a man's fist, thrown by Campbell, struck said Grant in the small of the back and knocked him down. (Tr., pp. 107, 108, 109.)

Campbell & Tobin, defendants below, had discovered a vein or lode of quartz in place, at a depth of 40 feet from the surface, in the hole which plaintiff Grant had started and sunk 12 feet, and had, by reason of such discovery, pretended to locate said quartz lode on June 6, 1921. (Tr., pp. 6, 7–114.) The discovery made by Campbell & Tobin is agreed in the record to be sufficient. (Tr., pp. 113, 114.) Wm. Grant having seen the substance which came from this shaft and finding the Campbell & Tobin discovery, as above described, sufficient, thereupon located said vein on July 25, 1921. (Tr., pp. 113, 114.) He posted notice of discovery on the discovery stake at the Campbell & Tobin shaft and wrote upon said stake as follows: "That the undersigned a citizen of the United States having discovered at the place where this notice is posted on the 25th of July, 1921, a vein or lode of quartz or other rock in place bearing gold or other valuable mineral deposit does hereby locate and claim the same as the notice on initial post of lode mining claim. The general course of the vein or

lode, as far as the same can now be ascertained, is westerly and the undersigned hereby locates and claims the same 1500 feet in length and 50 feet in width in a westerly direction from the point of discovery where this notice is posted and a total width of 50 feet the same being 25 feet on each side of the center of said vein. Notice dated and posted this 25th day of July, 1921. This claim is known as the Hill Side Quartz Claim. Wm. Grant locator." (Tr., pp. 114, 115, 116.) Mr. Grant then proceeded to mark the boundaries of his Hill Side Lode Claim and placed three posts at or just below Quigley's lower end line: One, the center end post and the other two corner posts. He then went downhill 1450 feet from discovery and on the lower center end stake wrote substantially the same made as on the discovery stake. Placed his name thereon, date of location, name of the location, Hill Side Lode Claim and set out two corner stakes at the lower end line 25 feet on each side of the lower center end post. (Tr., pp. 116–118.)

Grant wrote on the southwesterly corner stake "Southwesterly corner of Hill Side Lode Claim, staked July 25, 1921. Wm. Grant locator." He placed arrows thereon one pointing uphill and the other pointing to the lower corner. He indicated on the other lower corner "Southeast," otherwise the writing was the same as the southwesterly corner. (Tr., pp. 118, 119.) These corner posts were over three feet high and from three to five inches in diameter. The center stake was a big one. (Tr., p. 119.) On the lower center stake Grant wrote

"Lower center stake of the Hill Side Lode Claim, staked July 25, 1921, claiming 1500 feet in an easterly direction to upper center post," and signed his name. (Tr., pp. 119, 120.)

From these lower stakes the locator could and did see the upper end stakes. (Tr., p. 120.) On the upper center end stake this locator placed the same date as is contained in his location certificate. (Tr., pp. 120, 121.)

On the corner stakes of the upper end line he wrote the date of location, name of the claim, name of the corners and name of the locator. These upper corner stakes were four feet high and five or six inches square. (Tr., p. 121.) All six of these stakes were square. (Tr., p. 122.)

Wm. Grant based his location of the Hill Side Bench Claim on the discovery which Campbell & Tobin had made. He called it then a "known lode." He regarded it as a known lode after Campbell & Tobin had opened it up. Prior to that time it was not known. (Tr., pp. 122, 123.)

July 26, 1921, Wm. Grant filed for record with the recorder of said Kantishna Precinct his location certificate to said Hill Side Quartz Claim. (Plffs. Ex. "C." (Tr., pp. 124, 125.)

Grant's Hill Side Quartz Claim lies substantially within the boundary lines of Campbell & Tobins' quartz claim (The Silver King Lode Mining Claim), (Tr., pp. 125, 126.)

There is an abundance of testimony proving that Campbell & Tobin, after sinking a few feet in a hole

about 14 feet to the right or up Moose Creek from Grant's hole, 12 feet deep, took possession of Grant's 12-foot hole, and sank therein to a depth of 40 feet, and that they did not know of the existence of a vein or lode until they had prospected to that depth. (Tr., p. 444, 445, 295, 296, 217–219, 84–86, 562–564.)

LEGAL QUESTIONS INVOLVED.

The foregoing statement of facts necessarily involves the following legal questions:

1st. Did Wm. Grant sufficiently comply with the placer mining laws of the United States and Alaska to locate a valid placer mining claim in the Hill Side Placer location.

2d. In view of its excess in area, did Wm. Grant cast off, expressly or impliedly, this excess contained in Quigley's Red Top Location, or did Quigley carve out the excess by his Red Top location, thus changing the boundaries of the placer claim, or eliminating therefrom all territory in which a known vein existed.

3d. Did the entry of Campbell & Tobin upon the placer mining claim and into Grant's 12-foot hole, without permission, and without the knowledge of its owner and without his subsequent ratification of such acts, constitute a trespass. If a trespass, could plaintiffs in error initiate or acquire any title to the quartz location.

4th. After the discovery of the lode by plaintiffs in error, and it thereby became a "known lode" within the exterior bound-

aries of Grant's placer claim as it then existed, did Wm. Grant have the same right to make a quartz location on this lode, as any other person, not connected with the trespass of Campbell & Tobin.

5th. Did the defendant in error sufficiently comply with the quartz mining laws of the United States and Alaska to constitute a valid quartz location in the Hill Side Lode Claim.

6th. Did the Court err in rejecting evidence offered by defendants below.

7th. Did the Court err in its instructions to the jury.

I.

GRANT'S HILL BENCH VALID PLACER LOCATION.

On September 10, 1919, William Grant, plaintiff in error, entered upon the ground in controversy, and after panning material taken from three holes in the ground, discovered gold, which he describes as fairly coarse. He testifies that, upon taking into consideration the character of the ground, and its formation and location with reference to other placer claims in the same vicinity, this discovery was sufficient to justify an ordinarily prudent man in expending further labor or money in developing the property for mining purposes. (Tr., p. 62.) There is no conflict of testimony upon the question of discovery. The evidence is sufficient in law to constitute a valid discovery.

Cascaden vs. Bartolis, 162 Fed. 267.
Lang vs. Robinson, 148 Fed. 799, 803.
Charlton vs. Kelly, 156 Fed. 433.
2 Lindley on Mines, 3 Ed., sec. 437.

April 19, 1920, Grant returned to the property, marked its boundaries by adopting two stakes of the well known Horseshoe claim, an adjoining property, as two of Grant's corner stakes, and upon one of these adopted stakes placed his location as his initial stake and numbered it "1." John Hamilton, owner of said Horseshoe claim, was present, gave his consent to such adoption, and witnessed Grant's location. (Tr. pp. 64, 65.) The next day two other corner stakes were set in place, and all of said four corner stakes were numbered, the name of the claim and locator placed on each stake, and the stakes were described by the testimony of Mr. Grant as being equal to, and even larger than, the statute prescribed. All these stakes contained arrows pointing to the next nearest corner stake and the various stakes were in plain view to each other. The direct testimony of plaintiff below discloses a full and technical compliance with the statute, excepting that, instead of *placing* (italics ours) the first two corner stakes, as the statute directs, he *adopted* two of Hamilton's stakes, with Hamilton's consent. Counsel for plaintiffs in error insists upon such a technical interpretation of this statute as to contend that no stake, tree, stone or other monument can be adopted. We presume it is because the statute does not say so. The Court instructed the jury that "a substantial compliance

with the laws governing the location of quartz and placer mining claims is all that the law requires."

The mining laws and the federal statutes concerning the same have very generally been construed liberally in favor of the locator. This liberality in construction has also been applied by most of the courts in construing state and territorial laws supplementary to the federal statutes.

2 Lindley on Mines, 3 ed., sec. 374, p. 887.

The marking upon the initial stake is herein described in our statement of facts (referring to the record).

The certificate of location was duly filed of record, and all acts as required by law, to constitute a valid placer location, were proven and the testimony concerning the same submitted to the jury. The jury necessarily found plaintiff's placer location to be valid. Counsel for plaintiffs in error attempts to raise a question of fact in regard to marking the boundaries, on account of a conflict in the testimony of plaintiff below, between his direct examination and his cross-examination. The discrepancy in this particular seems to exist, but the jury found the facts to be according to plaintiff's detailed testimony contained in his direct examination.

II.

EXCESS AREA WAS CAST OFF AND ABANDONED BY PLACER CLAIMANT OR CARVED OUT BY QUIGLEY'S RED TOP QUARTZ LOCATION.

In our statement of facts we referred to the tran-

script showing that Grant's placer claim was larger than indicated by the calls in his notice of location. That subsequently Quigley was allowed to build, without objection, several buildings, which reduced in size the placer area. After this reduction, the placer claim was still excessive in area, and about August 7th, 1920, Quigley made a location of a quartz claim, extending down into the upper side of Grant's placer claim, which appropriated or carved out of this placer claim about 3.7 acres. (Tr. pp. 627, 628.) That the mouth of Quigley's tunnel, which is the nearest point to the amended lines of Grant's placer claim, is 173 feet therefrom. The jury necessarily found that the excess of this placer location was located by Quigley's quartz claim, with the consent of the placer claimant. The testimony is also sufficient to justify the Court in giving Instruction No. 40.

After Quigley's discovery of a vein, although within the boundaries of Grant's excessive placer claim, and after such vein was by Quigley duly located as a quartz claim, by marking the boundaries 173 feet or more from any point on a known vein, the ground so covered could no longer be considered within the boundaries of the placer location. The foregoing statement is made in view of the fact that Quigley's location was carved out of a part of the excessive placer claim, by the consent of, or with the knowledge and without the objection of, the placer claimant. As the jury found upon the testimony, it necessarily follows that, at the time of the entry upon Grant's placer claim by the plain-

tiffs in error, there was no known vein within such placer limits.

A locator may abandon any portion of his claim without forfeiting any rights to the remainder.

2 Lindley on Mines, 3 ed., sec. 365, sec. 448–c.
McIntosh vs. Price, 121 Fed. 716.
Zimmerman vs. Funchion, 161 Fed. 859.
Waskey vs. Hammer, 170 Fed. 31.
Jones vs. Wild Goose M. & P. Co., 177 Fed. 95.

III.

PLAINTIFFS IN ERROR WERE TRESPASSERS WHEN THEY ENTERED UPON GRANT'S VALID PLACER LOCATION.

The record discloses, as indicated in our statement of facts, that plaintiffs in error entered upon Grant's placer claim between May 25 and 30, 1921. That they then entered into and took possession of Grant's 12 ft. hole and continued to sink the same to a depth of 40 ft. from the surface, at which point they discovered a lode or vein on June 6, 1921, and by reason of such discovery located their claim in controversy herein. That during all of this time the placer claimant, William Grant, was absent and had no knowledge of such entry and prospecting until some time after the location of plaintiffs in error. That, soon after learning the foregoing facts and about June 25, 1921, Grant posted trespass notices upon his claim and in July of the same year reposted the same, they having been torn down, and while reposting such trespass

notices Grant was knocked down by a rock thrown by plaintiff in error Campbell.

It is, therefore, undisputed that Grant had no knowledge of such trespass until after the quartz location, and that he, said Grant, never ratified the same.

Grant, owning a valid placer mining claim at the time of the entry, pospecting, and location of plaintiffs in error, he possessed property in the highest sense of that term and he was entitled to the right of exclusive possession, and actual possession thereof was no more necessary for the protection of his title than for any other grant from the United States.

2 Lindley on Mines, 3 ed., sec. 539.

Belk vs. Meagher, 104 U. S. 79, 26 L. Ed. 735.

Gwillam vs. Donnellan, 115 U. S. 45, 5 S. Ct. 1110, 39 L. Ed. 348.

Duffield vs. San Francisco Chemical Co., 205 Fed. 485.

In which case this Court declares that the locator of a vein, after prospecting for such vein, had no right to enter for such purpose "if there were valid placer claims covering the same ground." In this case, however, the Court held that the prior placer location was invalid.

Clipper Min. Co. vs. Eli Min. & Land Co., 194 U. S. 220, 226; 24 S. Ct. 632, 28 L. Ed. 944.

The only exception to this right of exclusive possession is that where there is a *known* lode, any

qualified person may peaceably enter upon such placer ground and locate such known lode or vein.

Clipper Min. Co. vs. Eli Min. & Land Co. (Colo.), 68 Pac. 286.

Iron Silver Min. Co. vs. Reynolds, 124 U. S. 374, 8 S. Ct. 599.

To justify such entry the lode or vein must be *known*. A belief in its existence, however well-founded on theory, and facts known to exist outside of the boundaries of the placer claim, is not sufficient to constitute a known vein.

Sullivan vs. Iron Silver Min. Co., 143 U. S. 436, 12 S. Ct. 555.

In this case, veins or loads were known to exist on or in adjacent land, which were believed to extend into the ground in controversy, but the Supreme Court declares the law to be as above stated.

Iron Silver Min. Co. vs. Reynolds, *supra*.

Noyes vs. Nantle, 127 U. S. 348, 8 S. Ct. 1132.

The record in this case, referring to our statement of facts, indisputably discloses the fact that plaintiffs in error did not know of the existence of any vein or lode within the boundaries of the placer claim, after being reduced by Quigley, until they had reached a depth of 40 feet from the surface. At this point they made a discovery of a vein and located the same and gave the date of their discovery as June 6th, which date was some two weeks after their entry and after about two weeks' prospecting. They are bound by such date

of discovery as being the date of their first knowledge of the existence of the vein or lode.

The Supreme Court of Colorado, in the case of Clipper Min. Co. vs. Eli Min. & Land Co., *supra*, says: "So long, therefore, as lode claims are not known to exist within the limits of the prior placer claim at or before the time of the application for placer patent, it is unlawful for one to go within its limits for the purpose of prospecting for, and with the hope of discovering, and locating them."

The Supreme Court of the United States, in Clipper Min. Co. vs. Eli Min. & Land Co., *supra*, by Justice Brewer, uses the following language: "We agree with the Supreme Court of Colorado as to the law when it says that one may not go upon a prior valid placer location to prospect for unknown lodes, and get title to lode claims thereafter discovered and located in this manner within the placer boundaries, unless the placer owner has abandoned his claim, waives the trespass, or by his conduct is estopped to complain of it. Perhaps, if the placer owner, with knowledge of what the prospectors are doing, takes no steps to restrain their work, and certainly if he acquiesces in their action, he cannot, after they have discovered a vein or lode, assert right to it, for generally a vein belongs to him who has discovered it, and a locator permitting others to search within the limits of his placer might not thereafter appropriate that which they have discovered by such search."

In the case at bar, no acquiescence upon the part of Grant could have existed, because the evidence

is undisputed that he was temporarily absent and had no knowledge of this trespass until after plaintiffs in error had prospected for about two weeks in the hole heretofore sunk by Grant, as aforesaid, and after they had discovered a vein and made a location thereon. The Court further says: "It would seem strange that one owning a vein, and having a right in pursuing it to enter beneath the surface of another's location, should be expressly forbidden (by section 2322, R. S.) to enter upon that surface, if at the same time one owning no vein and having no rights beneath the surface is at liberty to enter upon this surface and prospect for veins as yet undiscovered."

The contention that, if a vein has its apex within the limits of a placer claim, a stranger can enter upon, sink a shaft, and search for such vein, and obtain title thereto, without the consent of the owner of the placer, is answered in the foregoing opinion as follows: "If one may do it, others may, and so the whole surface of the placer be occupied by strangers seeking to discover veins beneath the surface." "Of what value, then, would the placer be to the locator?" "Placer workings are surface workings, and if the placer locator cannot maintain possession of the surface he cannot continue his working." "And if the surface is open to the entry of whoever seeks to explore for veins, his possession can be entirely destroyed."

That no rights of location can be initiated as the result of a trespass is expressly recognized by the Supreme Court, through Justice Brewer, in Del

Monte Min. & M. Co. vs. Last Chance Min. & M. Co., 171 U. S. 55, 18 S. Ct. 895, and in Clipper Min. Co. vs. Eli Min. & Land Co. (Colo.), *supra.*

Counsel for plaintiffs in error, in his brief, at page 23, quotes 2 Lindley on Mines, 3 ed., sec. 413, giving Mr. Lindley's conclusions, as follows: "(2) Such lodes (referring to lodes 'found to exist') may be appropriated (a) by the placer claimant or (b) by others, provided the appropriation is effected by peaceable methods and in good faith." We submit that this statement of Mr. Lindley is not complete and does not furnish authority that such lode may be discovered without the knowledge or consent of the placer claimant as the result of prospecting and exploration by a stranger. Mr. Lindley quotes the Clipper case apparently to sustain some statements which are not therein sustained, but confused with other problems, and we refer to the last part of the last paragraph of section 619, 2 Lindley on Mines, 3 ed., and submit that said last part of said sentence is not sustained by any adjudicated case, but that the first part of said sentence is sustained by the Clipper case.

On page 286 of Morrison's Mining Rights, 15th ed., the author says: "It has been held that no third party can enter within the limits of a placer location to prospect for lodes." "And if he does so enter, discover, and locate a lode, it is a claim initiated by trespass and is void." Citing Clipper Min. Co. vs. Eli Min. & Land Co., 194 U. S. 220, 48 L. Ed. 944, 24 S. Ct. 632. The law, therefore, as contended herein, seems to have been conclusively

determined by the U. S. Supreme Court in the opinion of Mr. Morrison.

IV.

AFTER THE DISCOVERY OF A LODE BY PLAINTIFFS IN ERROR, NOTWITHSTANDING THEIR VOID LOCATION OF SUCH LODE, MR. GRANT, OWNER OF THE PLACER, HAD THE RIGHT TO LOCATE SUCH LODE.

Mr. Lindley states, on page 963, sec. 413, 2 Lindley on Mines, 3 ed., that: "There is no reason why a placer claimant may not locate a lode claim within his unpatented placer claim, or consent that others may do so." Citing McCarthy vs. Speed, 11 S. D. 362, 77 N. W. 590, 592, 50 L. R. A. 184, and Clipper Min. Co. vs. Eli Min. & Land Co. (S. Ct.), *supra*.

Plaintiffs in error, by their wrongful prospecting, uncovered a vein. Notwithstanding that this was done in trespass and that they could not thereby initiate title, others not connected with such trespass could have located the same as a known vein. This was done by the defendant in error.

V.

DEFENDANT IN ERROR LOCATED THE HILLSIDE LODE CLAIM BY COMPLYING WITH ALL PROVISIONS OF LAW CONCERNING QUARTZ LOCATIONS.

It is diclosed in our statement of facts, referring to the transcript of record, that all necessary acts to make this lode location were performed by plain-

tiff below. There is no contention to the contrary on the part of plaintiffs in error, saving and excepting the fact that they apparently contend that this lode was not open for location, by reason of their title which is by them contended for herein.

The Court properly excluded the proposed testimony of the proposed witness John A. Davis. The only error alleged upon the Court's ruling on objections to evidence offered is disclosed on pages 13, 14, and 15 of the brief of plaintiffs in error. Counsel fails to set forth in his brief the proceedings concerning the same. It appears, however, that the proposed testimony of Davis was concerning Davis' investigation of the premises and vicinity, made in September, 1921, three months after the pretended location of plaintiffs in error. For this reason the testimony was properly excluded. Counsel states in his brief, at page 15, that Mr. Quigley testified to the same things that he expected to prove by the said Davis. This is a statement not justified by the record, but, if true, it renders the proposed testimony of Davis merely cumulative.

The offered testimony of Mr. Davis, the instructions of the Secretary of the Interior protesting against employees of the Bureau of Mines testifying (upon the grounds that same is against public policy, etc.), the preliminary questions concerning the same, the statement of what counsel for defendants below expected to prove, the objection by plaintiff's counsel, the remarks of the Court and of counsel, and the statements of said proposed witness, together with the ruling of the Court exclud-

ing said proposed testimony, are all disclosed on pages 473–477, inclusive, of the transcript of record. If the Court erred, such error should have been shown in detail in the brief of plaintiffs in error, under the rules of this Court. We submit, in the event this Court goes beyond counsel's brief and examines the record, that it will appear that the Court justified, upon the ground of public policy, in excluding the proposed testimony; that such proposed testimony was, according to counsel, merely cumulative; that the objection of plaintiffs below was well taken, because the proposed testimony related to an investigation made after plaintiffs in error had made their pretended location; and that the proposed testimony did not purport to give any positive or known proof of a vein or lode existing within the boundaries of plaintiff's placer location, but, on the contrary, consisted of the advancement of a theory and upon extrinsic facts which would be merely in aid of the theory or belief that a lode existed in the placer claim.

VII.

THE COURT DID NOT ERR IN ITS INSTRUCTIONS TO THE JURY.

We submit that, in the brief of plaintiffs in error, counsel has failed to set out separately and particularly the errors assigned and relied upon and has failed to set forth the instructions given and instructions refused in such assignment of errors. In the event that this Court goes beyond said brief and examines the various assignments of errors relied upon, we submit that it will find: (1) That

the law and proceedings of this case have been covered in his brief; (2) that an inspection of the instructions of the Court to the jury, when considered as a whole, discloses no fatal error on the part of the trial Court.

The judgment of the lower Court, based upon the verdict of the jury, should be affirmed.

Respectfully submitted,

MORTON E. STEVENS,

Attorney for Defendant in Error.

Due service of a typewritten copy of the foregoing brief admitted this 22d day of October, 1923, and the service of a printed form of said brief is hereby waived.

R. F. ROTH,

Attorney for Plaintiffs in Error.

B. O.